

“Six Floors” of Detainee Operations in the Post-9/11 World

THOMAS E. AYRES

“All you need to know is that there was a before 9/11 and an after 9/11.
After 9/11 the gloves came off.”

— Cofer Black, CIA¹

Before 9/11, many nations battled terrorists and mufti-clad insurgents in places like Ireland, Israel, and Algeria and subsequently detained these nontraditional combatants. These nations deliberated the applicability and relevance of the Geneva Conventions² and frequently decided to conduct their detainee and interrogation operations by other standards.³ The United States had faced similarly ambiguous combatants in past conflicts, choosing “to extend basic prisoner of war protections to such persons . . . based upon strong policy considerations, and . . . not necessarily based on any conclusion that the United States was obligated to do so as a matter of law.”⁴ After 9/11, however, the United States ceased viewing its efforts against terrorism as a police enforcement action and embarked upon a Global War on Terrorism.⁵ The Bush Administration asserted this was “a new kind of war” that justified reconsidering the manner in which the Laws of War would be interpreted and applied.⁶ According to Defense Secretary Donald Rumsfeld, “The reality is, the set of facts that exist today with al Qaeda and the Taliban were not necessarily the set of facts that were considered when the Geneva Conventions were fashioned.”⁷ Certain provisions of the Geneva Conventions were even considered “quaint.”⁸ The United States has, by its post-9/11 policies and actions, demonstrated that the standards for conducting detainee operations, and perhaps the Geneva Conventions themselves, are ripe for reform.

Report Documentation Page				Form Approved OMB No. 0704-0188	
Public reporting burden for the collection of information is estimated to average 1 hour per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to Washington Headquarters Services, Directorate for Information Operations and Reports, 1215 Jefferson Davis Highway, Suite 1204, Arlington VA 22202-4302. Respondents should be aware that notwithstanding any other provision of law, no person shall be subject to a penalty for failing to comply with a collection of information if it does not display a currently valid OMB control number.					
1. REPORT DATE 2005		2. REPORT TYPE		3. DATES COVERED 00-00-2005 to 00-00-2005	
4. TITLE AND SUBTITLE 'Six Floors' of Detainee Operations in the Post-9/11 World				5a. CONTRACT NUMBER	
				5b. GRANT NUMBER	
				5c. PROGRAM ELEMENT NUMBER	
6. AUTHOR(S)				5d. PROJECT NUMBER	
				5e. TASK NUMBER	
				5f. WORK UNIT NUMBER	
7. PERFORMING ORGANIZATION NAME(S) AND ADDRESS(ES) U.S. Army War College, 122 Forbes Avenue, Carlisle, PA, 17013-5244				8. PERFORMING ORGANIZATION REPORT NUMBER	
9. SPONSORING/MONITORING AGENCY NAME(S) AND ADDRESS(ES)				10. SPONSOR/MONITOR'S ACRONYM(S)	
				11. SPONSOR/MONITOR'S REPORT NUMBER(S)	
12. DISTRIBUTION/AVAILABILITY STATEMENT Approved for public release; distribution unlimited					
13. SUPPLEMENTARY NOTES Parameters, US Army War College Quarterly, Autumn 2005, Vol 35, No. 3					
14. ABSTRACT					
15. SUBJECT TERMS					
16. SECURITY CLASSIFICATION OF:			17. LIMITATION OF ABSTRACT Same as Report (SAR)	18. NUMBER OF PAGES 21	19a. NAME OF RESPONSIBLE PERSON
a. REPORT unclassified	b. ABSTRACT unclassified	c. THIS PAGE unclassified			

The war on terror is in its fourth year, yet there has been little academic or political agreement on what detention and interrogation techniques are ethically advisable and legally allowed. US detainee operations in Afghanistan, Iraq, and Guantanamo have been labeled a “gray zone” by one analyst.⁹ US classification of detainees in Afghanistan and Guantanamo Bay as “unlawful combatants” has aroused voluminous and vociferous academic debate,¹⁰ complicated because there are no internationally accepted, clearly delineated detention and interrogation standards for treating “unlawful combatants.” Even in Iraq, where the Administration conceded the Geneva Conventions applied, the overall post-9/11 paradigm shift prompted the Army’s command to conduct a deliberative analysis of acceptable interrogation and detention techniques.¹¹ The Department of Defense is currently undergoing a more comprehensive formal initiative, with the Army acting as the lead agent.¹²

To describe the complexity of conducting modern military operations in an urban environment, US Marine Corps General Charles C. Krulak used the metaphor of a “three-block war,”¹³ an environment wherein soldiers or marines simultaneously fight a high-intensity conflict in one block, suppress a simmering insurgency in another block, and facilitate humanitarian aid in a contiguous third block. Military forces conducting operations must anticipate encountering an array of friendly, hostile, and neutral persons within the three blocks. Detainees from these three blocks may be interrogated for strategic, operational, or tactical reasons.

Just as recognizing the nature of the “three-block war” enables commanders to conduct successful operations in that environment, clarifying lines of demarcation within the new gray zone of detainee operations is essential. Delineating the categories of potential detainees is the starting point. Determining the limits on interrogations and other legal responsibilities for each category of detainees is the logical next step. The Geneva Conventions provide the basis for considering different categories of detainees; they also provide the legal, ethical, and moral framework for differentiating treatment among the categories. Publishing a post-9/11 framework and clearly communicating that the United States faithfully adheres to a well-enunciated and reasoned, if new, standard can substantially support US policy and strategy.

Lieutenant Colonel Thomas E. Ayres is a member of the Judge Advocate General’s (JAG) Corps and currently serves as Deputy Legal Counsel to the Chairman of the Joint Chiefs of Staff. He is a graduate of the US Military Academy, the University of Pennsylvania’s School of Law, and the US Army War College. Lieutenant Colonel Ayres served as the Staff Judge Advocate for the 82d Airborne Division in both Operations Enduring Freedom and Iraqi Freedom.

The Bush Administration's strict legal analysis and categorization of detainees in the Global War on Terrorism offers a useful starting point for considering the levels of protection currently afforded by the Geneva Conventions. Before developing guidance on allowable interrogation techniques, the Administration sought to distinguish these detainees as something other than POWs as defined by Geneva III.¹⁴ The war on terror was a global war with a new kind of enemy.¹⁵ The Administration considered Geneva's categories of protected persons, protected places, and occupiers' obligations, and assessed that strict adherence would result in unnecessary and counter-productive legal, procedural, and monetary obligations.

As an angry nation reeled from the 9/11 attack, the Bush Administration made an initial determination against granting POW status to Taliban and al Qaeda members detained in Afghanistan. On 19 January 2002, Secretary Rumsfeld transmitted a directive to the Combatant Commanders that captured members of the Taliban and al Qaeda were to be treated humanely. He added, however, that they "are not entitled to prisoner of war status for purposes of the Geneva Conventions of 1949."¹⁶ On 28 January 2002, President Bush stated that he had met with his national security team and decided the detainees were illegal combatants and would "not be treated as prisoners of war."¹⁷

This position confirmed the predilection to avoid being bound by the constraints of the Geneva Conventions in this war with a new kind of enemy. On 7 February 2002, the President published a memorandum specifying the results of his Administration's legal analysis.¹⁸ The analysis determined that the US action in Afghanistan met the criteria for an international conflict, but that captured Taliban would not be considered POWs because they did not meet the international standards for lawful combatants. The Administration also decided not to classify al Qaeda detainees as POWs because al Qaeda was not a state or a party to the Conventions, nor did their members meet the criteria for lawful combatants. The memo concluded that considering "our values as a nation . . . as a matter of policy, the United States Armed Forces shall continue to treat detainees humanely and, to the extent appropriate and consistent with military necessity, in a manner consistent with the principles of Geneva."¹⁹ The President's memorandum made no mention of the Administration's position with respect to adherence to the Convention Against Torture,²⁰ perhaps never anticipating that the US position and values regarding that convention would be brought into question.

The Administration did not similarly articulate its position on the legal status of the forces faced in Iraq, even well into the conduct of Operation Iraqi Freedom. During the high-intensity phase of the conflict, US forces not only faced and captured numerous uniformed combatants they rightly treated as POWs, they also encountered forces they claimed functioned as unlawful combatants.²¹ Since then, coalition forces have continuously engaged an array of in-

surgeons and foreign fighters, such as Zarqawi's "al Qaeda in Iraq," whose status under the Geneva Conventions is, at best, problematic. Yet the Administration's published status determination for detainees in Afghanistan and Guantanamo has not been replicated for the conflict in Iraq. Following the Abu Ghraib scandal, the Administration stated, "The President made no formal declaration with respect to our conflict in Iraq because it was automatic that Geneva would apply. . . . The war in Iraq is covered by the Geneva Conventions, so our policies there must meet those standards, in addition to the torture convention."²² However, when an official spokesperson was directly asked about Zarqawi's status in Iraq, he could respond only that it was a "very interesting question."²³

The Administration's approach to detention operations in Afghanistan and Guantanamo and its slowness in addressing the issue in Iraq indicate its unwillingness to apply Geneva III's guidance to handling Global War on Terrorism detainees. Even so, the Administration declares the underlying position that the "United States is treating and will continue to treat all of the individuals . . . humanely and to the extent appropriate and consistent with military necessity, in a manner consistent with the principles of the Third Geneva Convention of 1949."²⁴ However, the detainees in Afghanistan and Guantanamo "will not receive some of the specific privileges afforded to POWs, including: access to a canteen . . . a monthly advance of pay . . . the ability to receive scientific equipment, musical instruments, or sports outfits."²⁵ The Administration asserts that severe security risks preclude affording all of the privileges allowed by Geneva III.

Significantly, the Administration appeared determined not to apply the Geneva Conventions to the Taliban and al Qaeda in order to preserve US options and flexibility in dealing with the detainees. Captured terrorists and their sponsors likely possess information which could prevent "further atrocities against American civilians," but Geneva III's strict guidance with respect to treatment of POWs does not facilitate attempts to obtain that knowledge or information.²⁶ US officials further recognized that granting POW status to Taliban and al Qaeda members would put US interrogation agents at risk of prosecution, because any "outrages against personal dignity," as prohibited by common Article 3 of the Conventions, could be domestically prosecuted as a war crime.²⁷ There was also an explicit recognition that designation of Taliban and al Qaeda as POWs would greatly restrict options with respect to their ultimate disposition.²⁸ By law and custom, POWs are normally repatriated and released from confinement at the cessation of hostilities. However, US officials acted under the presumption that the ideological terrorists at issue must not be subject to release on those terms; rather, they should be subject to incarceration indefinitely or for a term of years determined by a trial for their crimes. By not designating Taliban and al Qaeda

detainees as POWs, the Administration retained several means whereby they could ultimately be incarcerated and tried—such as military tribunals, domestic criminal courts, international war crimes tribunals, even as POWs at court-martial. Indeed, the status determination arguably provides the framework by which terrorists could be turned over, extradited, or “rendered” to foreign nations that might not be as punctilious and restrained with respect to the Convention Against Torture. In the final analysis, the Administration has sought to keep its options open, refusing to be bound by the confines of strict adherence to Geneva or the traditional criminal approach.²⁹

Pre-9/11 US Army Detention and Interrogation Doctrine

There are four criteria by which nonuniformed combatants may obtain status as POWs under Geneva III, the Convention on Prisoners of War.³⁰ These combatants must fight in distinguishable clothing or wear a distinctive insignia recognizable at a distance, carry their arms openly, act under the leadership of responsible command, and conduct their operations in accordance with the laws of war.³¹ In past conflicts in Vietnam, Panama, Somalia, Haiti, and Bosnia, the United States often faced an enemy that did not meet these criteria. Nonetheless, US doctrine broadly required strict conformance with Geneva rules. Thus the recent “unlawful combatant” determination made previous doctrinal guidance, if not irrelevant, certainly subject to reinterpretation.

The Army is the Defense Department’s executive agent for the conduct of detention operations, and since World War II the Army’s guidance for regulating detention operations has strictly observed the Geneva Conventions.³² The Army’s overall guidance for detention operations is found in Army Regulation 190-8; it “implements international law, both customary and codified,” relating to “Enemy Prisoners of War (EPWs), Retained Personnel, Civilian Internees, and Other Detainees.”³³ The regulation recognizes shades of enemy compliance with Geneva by providing for Article 5 tribunals to determine questionable status; it offers no practical guidance on the outcome of that status determination. Doctrine therefore provides that all combatants, lawful or unlawful, are to be treated as POWs, and provides no guidance if another status is determined. The Army’s “doctrinal guidance, techniques, and procedures governing employment of interrogators” are set forth in Field Manual 34-52, *Intelligence Interrogation*.³⁴ This doctrine applies “to operations in low-, mid-, and high-intensity conflicts.”³⁵ Further, it anticipates provision of interrogator support for the full range of nuanced low-intensity conflicts: insurgency and counterinsurgency environments, peacekeeping contingency operations, and, notably, “combating terrorism.”³⁶ The doctrine also recognizes that not all interrogations can be conducted by trained interrogators; accordingly, it mandates that at the tactical level, when trained interrogator

“At the strategic level, the United States should lead serious international initiatives to update and revise the Geneva Conventions.”

support is unavailable, units should include “provisions and standing operating procedures (SOPs) for the ‘tactical questioning’ (not interrogation) of EPWs or detainees.”³⁷

Both the regulation and the manual assumed that the protections and limitations of the Geneva Conventions would apply to all aspects of detention and interrogation operations. The interrogation manual clearly stipulates that the “stated policy of the US Army [is] that military operations will be conducted in accordance with the law of war obligations of the US.”³⁸ The manual further provides the general guidance that all persons shall be afforded the full protections and status of an EPW when there is a question as to their true status, but gives no guidance on the practical effect of an other-than-POW status determination by an Article 5 tribunal. The manual notes incongruously that in low-intensity conflicts it is important to differentiate between EPWs and criminals, but provides no substantive guidance on whether to treat criminals differently.³⁹ To heighten the incongruity, it qualifies that, as a matter of policy, the procedures for interrogations and the cloak of Geneva protections apply to an even broader spectrum of categories of personnel than merely those who meet the criteria of protected persons under the Geneva Conventions. The manual then reiterates the general prohibition on the use of force and the affirmative obligations of the Geneva Conventions even with respect to the categories of: “Civilian internees, Insurgents, EPWs, Defectors, Refugees, Displaced persons, Agents or suspected agents [and], Other non-US personnel.”⁴⁰ Clearly then, pre-9/11 Army doctrine recognized that differentiation among categories of detainees was possible, but it straightforwardly directed that those differentiations and lines of demarcation would not be meaningfully recognized at the operational and tactical levels.

Some critics claim that the Bush Administration’s failure to categorize Global War on Terrorism detainees as POWs has led to widespread abuses. Human Rights Watch, for example, claims the “pattern of abuse” at Abu Ghraib resulted from “decisions made by the Bush Administration to bend, ignore, or cast rules aside.”⁴¹ The Administration, on the other hand, “categorically reject[s]” that the President’s determinations contributed to the abuses at Abu Ghraib.⁴² Investigating officers have found, however, that there was a causal connection,

noting that some of the nonviolent abuses of detainees in Iraq resulted from the failure to ensure uniform understanding of detention and interrogation guidance in-theater.⁴³ The Commander-in-Chief's specific finding that detainees in the Global War on Terrorism were to be classified as "unlawful combatants" had both intended and unintended effects. The determination carried significant legal consequences about how the military could conduct its detainee operations and with what vigor those detainees could be interrogated in Afghanistan and Guantanamo. There were larger practical consequences as well.

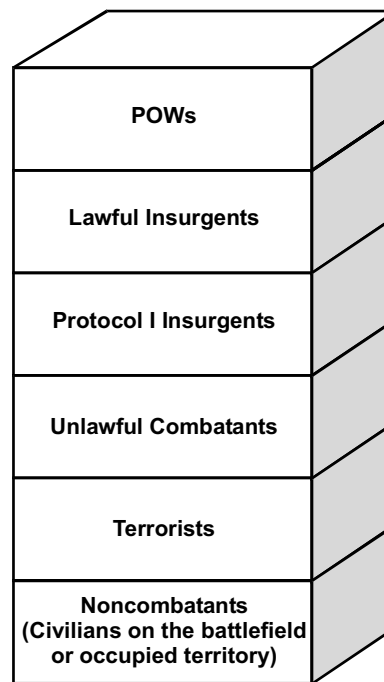
The Case for Categorizing Detainees Separately

The current confusing state of affairs can be substantially improved by clarifying categories of detainees and improving guidance to those conducting detainee and interrogation operations in the post-9/11 environment. There are also significant legal and ethical reasons to provide such guidance as the military revises its regulations and guidance to recognize post-9/11 realities. At the strategic level, the United States should lead serious international initiatives to update and revise the Geneva Conventions with respect to the treatment of detained persons to recognize the realities of the widespread adoption of terrorist tactics and the realities of modern terrorist operations. The revised Conventions should provide strong disincentives for such behavior. Additionally, in view of the lengthy process of acquiring the international consensus to update the Third and Fourth Geneva Conventions, the current Conventions should not be abandoned simply because they cannot be applied neatly to the realities of our era. They can facilitate a clearer delineation of categories of detainees, and they suggest allowable differences in treatment to provide incentives for lawful combat and to deter unlawful forms of combat. Finally, the US military should provide specific and unequivocal guidance to forces at the operational and tactical levels on the gradations of treatment and levels of protection applicable to six specific categories or "floors" of detainees, as shown in Figure 1, on the following page.

Fighting three-block wars throughout the post-9/11 world, US forces will detain individuals who should be categorized in one of the six floors of detainees shown in the figure. Once their status has been determined, their baseline legal protections or safeguards will also be assured.

On the top floor are easily identifiable enemy prisoners of war. POWs openly wear the uniform of a power that abides by the laws of war, and are accorded all privileges specified in Geneva III.⁴⁴ On the fifth floor reside lawful insurgents—combatants who meet the Geneva criteria of openly bearing arms, who wear a distinctive insignia or marking, who abide by the laws of war, and who are organized under responsible leadership. On the fourth floor are those less well-organized insurgents who may not have the ability,

Figure 1.
The “Six Floors”
of Detainees.



support, desire, or organization to wear distinctive insignia, but who meet the other three Geneva criteria and therefore meet the criteria of Protocol I to Geneva III (to which the United States is not bound). On the third floor reside unlawful combatants under Geneva III originally called saboteurs and spies; they act as insurgents and seek to conduct warfare against military targets without regard to the Geneva criteria for lawful combatants. On the second floor are “terrorists”; they meet the criteria of illegal combatants but additionally wage campaigns mostly against civilian rather than military targets with the intent to kill civilians as a means of spreading fear and intimidation throughout the civilian population. Finally, on the ground floor are a variety of noncombatants, including those suspected of assisting or encouraging those on the upper floors, those having knowledge about the whereabouts and methods of the members of the upper floors, those whose status or leanings are unknown, and truly innocent civilians.

The Top Floor: POWs

There seems little need, justification, or inclination to change the status or protections of POWs. POWs deservedly have the greatest level of protections and benefits. By design, Geneva III provides an incentive for nation-states or other international actors to wage war by means of uniformed armies. In providing this incentive, Geneva III attempts, as far as possible, to

shield civilians from the ravages of war. Uniformed soldiers facing each other in a “clean” war target each other based solely on their identifiable status, so they need not wait for their opponent’s demonstration of hostile intent. In so doing, they restrict their targets to the opposing uniformed forces and lessen the chances of collateral civilian injury. Uniformed soldiers also are provided immunity from prosecution for their lawful wartime efforts; they are granted the elevated “protected person” status when they surrender or are rendered unfit for further combat (*hors de combat*).⁴⁵ Upon capture, they are entitled to a full array of privileges and benefits as POWs. Perhaps most important, the limitation upon the extent and vigor of interrogations of POWs is sacrosanct:

Every prisoner of war, when questioned on the subject, is bound to give only his surname, first names and rank, date of birth, and army, regimental, personal or serial number, or failing this, equivalent information. . . . No physical or mental torture, nor any other form of coercion, may be inflicted on prisoners of war to secure from them information of any kind whatsoever. Prisoners of war who refuse to answer may not be threatened, insulted, or exposed to unpleasant or disadvantageous treatment of any kind.⁴⁶

Such absolute protection is both justified and appropriate. Simply by wearing the uniform and usual insignia, warring soldiers are exposed to incredible hazards. And their uniform answers the first question facing interrogators: Is this captured person a combatant or an innocent civilian? Civilized society should promote this kind of clarity when it is compelled to resort to warfare. Geneva III attempts to promote such behavior and thereby limit the brutality of war.

The Fifth Floor: Lawful Insurgents

Similarly, Geneva III provides clearly detailed guidance and incentive for insurgents to wage their warfare in an open, distinguishable manner. The rationale is clear: The Conventions recognize that not all warfare will be conducted by uniformed armies and that civilians will sometimes feel compelled to war against a state (as in the American Revolution in the 18th century or the French Resistance in World War II). But, as far as possible, those former civilians should conduct themselves like uniformed armies. If these combatants conduct themselves according to the rules laid out in Geneva III, then innocent bystander civilians will be at less risk of being injured collaterally. Specifically, Geneva III provides POW status and protections to:

Members of other militias and members of other volunteer corps, including those of organized resistance movements belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied, pro-

vided that such militias or volunteer corps, including such organized resistance movements, fulfill the following conditions: (a) that of being commanded by a person responsible for his subordinates; (b) that of having a fixed distinctive sign recognizable at a distance; (c) that of carrying arms openly; (d) that of conducting their operations in accordance with the laws and customs of war.⁴⁷

By specifying such conditions, the Convention seeks to promote or modify behavior. These soldiers are encouraged to observe the rules through the promise that, if they are captured, they will be treated as a warrior rather than as a spy.

Therefore, the Convention provides an incentive to combatants to conduct themselves in a certain way. It urges them to set themselves apart from the civilian population by wearing distinctive insignia and carrying their arms openly. The Convention then rewards that behavior with the POW's status and privileges if captured. Such recognition and reward is justified and should be continued.

The Fourth Floor: Protocol I Insurgents

While the United States has not signed the 1977 Protocol Additional to the Geneva Conventions,⁴⁸ a slight gradation exists internationally between insurgents who meet "Fifth Floor" criteria and those who do not. The United States tends to view Protocol I insurgents as nearly synonymous with unlawful combatants. The Truman Administration's note forwarding Protocol I to the Senate is particularly instructive:

Protocol I . . . would grant combatant status to irregular forces even if they do not satisfy the traditional requirements to distinguish themselves from the civilian population and otherwise comply with the laws of war. This would endanger civilians among whom terrorists and other irregulars attempt to conceal themselves. These problems are so fundamental in character that they cannot be remedied through reservations.⁴⁹

For those countries that recognize it, Protocol I does in fact grant POW status to any combatant who carries his arms openly during actual engagements and just prior to an armed attack. It completely excuses such combatants from observing any of the other three criteria in Article 4 of Geneva III.⁵⁰ Whether the United States should provide incentive to combatants merely to carry their arms openly, and then only some of the time, is problematic. Since many of the United States' closest allies have ratified Protocol I, however, the United States must recognize and straightforwardly address this reality as it conducts coalition detainee operations.⁵¹

As a matter of principle and policy, the United States at times categorizes and treats Protocol I insurgents as unlawful combatants. They do noth-

ing to distinguish themselves from the population at large and nothing to protect civilians from the general harms of warfare. As will be discussed more fully below, the international community should not provide an incentive to such conduct by providing the full panoply of POW privileges and protections for such behavior.

The Third Floor: Unlawful Combatants

The concept for identifying a category of unlawful combatants has been recognized for decades; what has not been agreed upon is the standard for treatment of such persons. Combatants who do not meet the criteria of POWs, militia as defined by Article 4, or Protocol I combatants, as discussed above, have been given several identifiers: “unprivileged belligerents,”⁵² “unprivileged combatants,”⁵³ “extra-conventional persons,”⁵⁴ “spies, guerillas, and saboteurs.”⁵⁵ The United States currently designates them as “unlawful combatants.”⁵⁶ As early as the US Civil War, the Lieber Code, published in 1863 as the Union Army’s General Order No. 100, recognized such distinctions. The Lieber Code included instruction on the labeling and treatment of “armed prowlers” (nonuniformed saboteurs), “war-rebels” (nonuniformed partisans in occupied territory), and spies (nonuniformed intelligence gatherers). It authorized that all of them could suffer death as the equivalent of spies.⁵⁷

This reasoning continued through modern times, and such distinctions are evident in the Geneva Conventions of 1949. As noted by Geneva III’s most respected contemporary analyst Jean Pictet, the drafters understood that those who failed to abide by the criteria for lawful combat did so “at their peril.”⁵⁸ Even more recently, but before the current debate, the seminal work on the status and privileges of unlawful combatants similarly concluded that few guarantees of protection had been purposefully afforded to unlawful combatants:

The correct legal formulation is, it is submitted, that armed and unarmed hostilities, wherever occurring, committed by persons other than those entitled to be treated as prisoners of war or peaceful civilians merely deprive such individuals of a protection they might otherwise enjoy under international law and place them virtually at the power of the enemy. . . . International law deliberately neglects to protect unprivileged belligerents because of the danger their acts present to their opponents.⁵⁹

While the current debate generally recognizes a category that can be called “unlawful combatants” or by some similar term, it also assumes that the Conventions provide little to no guidance on how these unlawful combatants should be treated while detained. Perhaps in anticipation and recognition of the paucity of international guidance, the international community concurred to a

baseline standard against torture in 1994 by means of the Convention Against Torture. This treaty applies not only to repressive regimes' treatment of their own subjects, but also to detention of all lawful and unlawful combatants either in internal or international armed conflicts.

It was into the black hole of international agreement that Secretary Rumsfeld boldly strode when he authorized interrogation measures less extreme than those that would violate the Convention Against Torture, and yet more stringent than those by which POWs may be questioned under Geneva III. Criticism immediately ensued, while others jumped to the Administration's defense.⁶⁰ The tales of such treatment came to be called "stress and duress tactics" by the press, although the Secretary of Defense's explicit guidance on detention and interrogation methods remained classified.⁶¹ Some relevant documents have now been declassified, however. It is now known that the Administration's so-called "stress and duress tactics" authorized several controversial interrogation techniques, but were limited to the following:

Category I techniques . . .

- (1) Yelling at the detainee (not directly in his ear or to the level that it would cause physical pain or hearing problems).
- (2) Techniques of deception: (a) Multiple interrogator techniques. (b) Interrogator identity. The interviewer may identify himself as a citizen of a foreign nation or as an interrogator from a country with a reputation for harsh treatment of detainees.

Category II techniques . . .

- (1) The use of stress positions (like standing) for a maximum of four hours.
- (2) The use of falsified documents or reports.
- (3) Use of the isolation facility for up to 30 days
- (4) Interrogating the detainee in an environment other than the standard interrogation booth.
- (5) Deprivation of light and auditory stimuli.
- (6) The detainee may have a hood placed over his head
- (7) The use of 20-hour interrogations.
- (8) Removal of all comfort items (including religious items).
- (9) Switching the detainee from hot rations to MREs.
- (10) Removal of clothing.
- (11) Forced grooming (shaving of facial hair, etc.).
- (12) Using detainees' individual phobias . . . to induce stress.⁶²

These techniques were approved by the Secretary of Defense for use on a limited, case-by-case basis and only with the approval of appropriate officials. The Secretary did not approve, "as a matter of policy," the use of what

was designated “Category III techniques.” Category III techniques can be described generally as the “use of mild non-injurious physical contact such as grabbing, poking in the chest with the finger, and light pushing.”⁶³ Such physical contact was prohibited.

The controversy over the designation of Taliban and al Qaeda prisoners as “unlawful combatants” seems to have subsided; however, the debate around the morality and effectiveness of the detention and interrogation tactics cited above continues. Indeed, after *The Washington Post* reported on the Pentagon’s “stress and duress” tactics, Human Rights Watch began to bring international pressure to bear against the United States to denounce these tactics.⁶⁴ Declassifying the “stress and duress” measures, despite their relative difference from conventional notions of torture, has not stemmed the controversy.

Beyond the controversy is the fact that the Administration’s current standards for interrogations tend to be counterproductive: They simply do not appear to yield sufficient information to warrant the domestic and international censure they generate. The conventional rationale for the current Category I and II interrogation techniques is that interrogators are able to obtain valuable information by exceeding the standards of Article 17 of Geneva III (stipulating that POWs will not be threatened, insulted, or exposed to any unpleasant or disadvantageous treatment of any kind), while not rising to the level of the stated White House position or the Convention Against Torture (“detainees will not be subjected to physical or mental abuse or cruel treatment”).⁶⁵

Advocates of the current techniques contend that in at least one case in which such additional techniques were applied, valuable information was gained.⁶⁶ They do not, however, state whether the information gained was a direct result of additional techniques or would have been gained in any event under compliance with Article 17. Further, there is no contention that the additional techniques succeeded beyond the one example cited.

It seems the United States has gained little information or intelligence by exceeding measures authorized by Article 17, yet the nation has lost international esteem by advertising its noncompliance with Geneva III. Even so, some aver that unlawful combatants will “crack” and divulge information if they are confronted with threats, insults, and unpleasant treatment not amounting to torture. This conclusion is unlikely and potentially irrational: The Defense Department readily acknowledges that many unlawful combatants have been trained in interrogation-resistance techniques, and the conclusion ignores widespread and typical experience.⁶⁷ Both anecdotal evidence and academic arguments indicate that stress and duress tactics, used sparingly by persons with extensive training and cultural understanding, can have utilitarian value. But if such tactics are made available across the spectrum of military operations, they can attract widespread scrutiny and criticism.

“The concept for identifying a category of unlawful combatants has been recognized for decades; what has not been agreed upon is the standard for treatment of such persons.”

In summary, unlawful combatants have long been recognized as a category of combatants. There is no clear international standard on how they should be treated in detention. The Bush Administration has designated that Taliban and al Qaeda detainees are “unlawful combatants” and enunciated clear standards on the how detainees in this category may be treated differently from POWs under Geneva. These new standards have been strongly criticized, and the US military is currently reviewing them in order to update operational doctrine and tactical guidance to incorporate them. However, US military forces charged with implementing the standards would operate most effectively by observing a standard that enjoyed international acceptance and consensus, that added utilitarian value to interrogators’ goals, and that provided considerable disincentive to hostile forces to employ tactics and methods identifying them as unlawful combatants. The only reasonable hope of providing such a standard is if the international community can agree to guidelines under which unlawful combatants can be treated and interrogated. Since such an agreement, or revision to Geneva III, is not likely in the near future, the US military should continue to categorize unlawful combatants only in the environs of Afghanistan and Guantanamo Bay. Likewise, it must treat unlawful combatants in those places precisely within the exact standards approved by Secretary Rumsfeld.

The Second Floor: Terrorists

Categorically distinguishing terrorists from unlawful combatants is not generally accepted. The distinction rests upon the contention that terrorists differ markedly from unlawful combatants because their tactics are even more heinous to civilization than are those of unlawful combatants generally. When the Geneva Conventions were adopted there was little evidence or practice to support this distinction. That is, terrorism is a recent phenomenon. Unlawful combatants, though they fight unconventionally, observe the principle of war of identifying and distinguishing the object of their attacks and then targeting their attacks on military objectives generally and civilians only collaterally. Terrorists, on the other hand, select civilians as their primary tar-

get and perpetrate violence and intimidation upon civilians in order to instill widespread fear throughout the civilian population to influence civilian leadership to act according to their dictate or design. Unlike partisan warfare, this terrorist tactic was not widespread prior to 1949. Although the “Geneva Conventions of 1949 are excellent instruments of humanitarian law, . . . they were unfortunately backwards-looking to the experience of World War II.”⁶⁸ Had the current terrorist tactics been widespread before the consideration and adoption of the Geneva rules, the drafters almost certainly would have attempted to provide a disincentive for adopting such a tactic to protect civilians from the ravages of combat, a persistent goal of the Conventions.

Even now, no international consensus or notable national authority recognizes the distinction between unlawful combatants and terrorists. However, identification of persons as being in a category nearly as heinous as terrorists, and allowance for especially harsh treatment of them, was recognized before the Middle Ages by the Romans as they fought what they termed “*latrunculi*—robbers, pirates, brigands, outlaws, ‘the common enemies of mankind.’”⁶⁹ Even though such an argument has not been formally adopted in modern times, as a practical matter several nations have identified terrorists as a special case and have embarked upon determining that they should be treated differently and more harshly. Such responses are potentially important because international law is not only determined and codified by means of treaties, but international law also values precedent by recognizing long-standing practices and accepted conduct of nation-states. Therefore, it is particularly instructive to consider specific case studies on how nations capturing and detaining terrorists treat them, either currently or in the recent past. Such evidence does not provide authority for US military practitioners to treat them similarly, but it does provide a useful starting point to consider how the international community might develop a standard by which a new category of “terrorists” might be treated in the future.

Three case studies provide specific techniques of how terrorists are presently treated more harshly. These involve activities in England and Israel, as well as an alleged US practice. England’s treatment of terrorists captured in Northern Ireland resulted in a case being heard at the European Court of Human Rights.⁷⁰ In that case, British authorities were found to have used interrogation methods including hooding, wall-standing (a stress position), subjection to noise, and deprivation of food, drink, and sleep. The European Court of Human Rights found that this treatment violated the European Convention on Human Rights and was therefore inhumane, but did not constitute torture. Similar techniques were used in Israel for a number of years: shaking, stress positions, excessive tightening of handcuffs, and sleep deprivation. The Supreme Court of Israel deemed that the techniques caused pain and suf-

fering and were thus illegal.⁷¹ The Court did not, however, determine that the techniques rose to the level of torture. Finally, it has been reported, but not verified, that the United States has used the technique of “rendering” captured terrorists to third countries that do not strictly observe the laws of war and may be using torture to elicit intelligence from rendered terrorists.⁷² Such conduct would certainly violate Geneva rules if the combatants had been granted the protections of POWs. Further, it would violate the Convention Against Torture even if the rendered prisoners were not granted the status of POWs. In all three cases, nations have apparently determined, at least temporarily, that terrorists’ protections and privileges fall below those afforded POWs, lawful combatants, and unlawful combatants. Yet these three nations seem unwilling to cross the line of conducting torture themselves.

In summary, the category of terrorists is not legally or practically recognized, so current detention operations should accord no “special treatment” for perceived terrorists. But consideration should be given to the effort to determine whether terrorists should be less privileged than unlawful combatants. Of course, making fine distinctions about when inhumane treatment or the infliction of minor pain and suffering fails to rise to the level of “torture” (physical or mental abuse) is far from easy, and very risky. Implementation of such policies necessarily relies upon the presumption that personnel on the ground executing the policy can discern the differences between legal and illegal techniques and inflict the degrees of treatment required in accord with these very subjective terms. In reality, even persons of good faith could argue over the effect of certain procedures and whether specific techniques constitute merely “unpleasant or inhumane treatment” or rather “physical or mental abuse.” Accordingly, US military practitioners in the field should consider separate identification and categorization of terrorists but steer well clear of embarking upon treating terrorists other than as authorized within the determinations of treatment for unlawful combatants. Further, even if national recognition or international consensus regarding a different categorization and treatment of terrorists does eventually come to fruition, the best course for military authorities would be to leave interrogations of those who are categorized as terrorists to civilian agencies, such as the Central Intelligence Agency, whose agents should have greater experience and more specific, nuanced, and detailed training in dealing with such detainees. But those agents also are bound by the Convention Against Torture, which the United States has signed and ratified.

The Ground Floor: Noncombatants

Geneva allows temporary internment of civilians to maintain operational security or the security of the civilians themselves.⁷³ Accordingly, mili-

tary forces the world over routinely temporarily detain and question civilians present on the battlefield. Such practice is commonplace because it recognizes that those civilians on the battlefield are at once both a potential source of valuable intelligence, as “the sea in which the partisan fish swim,” and, if nonuniformed combatants, then partisan fish themselves. Army Field Manual 34-52 describes the latter half of the problem succinctly: “Failure of the enemy to wear a uniform results in an identification problem. As a result, large numbers of civilian suspects may also be detained during operations.”⁷⁴ Questioning of civilians is routine; it is normally conducted by rank-and-file soldiers walking the ground, rather than by trained interrogators. So the protections and privileges granted noncombatants should be widely understood and thoroughly trained throughout the force.

Noncombatants are entitled to numerous protections, and their treatment is accordingly a sensitive issue. Geneva grants noncombatants the status of “Protected Persons” and gives them the protections of Common Article 3 (so named because it appears identically in all four Geneva Conventions). Common Article 3 prohibits acts of violence, cruel treatment, and torture against noncombatants “at any time and in any place whatsoever”; it also prohibits “outrages upon personal dignity; in particular, humiliating and degrading treatment.”⁷⁵ Noncombatants, of course, are also protected by the Convention Against Torture. When doubt arises as to whether an apparent noncombatant civilian may have committed a belligerent act, Geneva III, Article 5, dictates that a tribunal should be convened to determine his status. The United States has been recently criticized for not sufficiently adhering to this provision. The Committee on International Human Rights of the Bar Association of the City of New York reported: “The US should adhere to Geneva III’s requirement that any detainee whose POW status is in ‘doubt’ is entitled to POW status—and, therefore, cannot be subjected to coercive treatment—until a ‘competent tribunal,’ which must be convened promptly, determines otherwise.”⁷⁶

Additionally, civilians who are interned by a nation-state that is also an “occupying power” are granted greater and more specific privileges and protections than noncombatants generally. Geneva IV recognizes that civilians can be interned by an occupying power for any number of reasons, but dictates that civilians “shall retain their full civil capacity” and grants them even greater rights in some aspects than are granted POWs.⁷⁷ For instance, interned civilians must be housed separately from POWs, and the occupying power is charged with providing for the well-being of their dependents, so it must provide for the family members of the interned civilians.⁷⁸

The US military’s treatment of civilians suspected of being unlawful combatants or terrorists in Afghanistan or insurgents in Iraq is bound by the treaties mentioned above. If these detainees are not treated accordingly, their

detention can produce harmful second-order effects. Arguably, application of the Category I and II measures means that every suspect, even an innocent villager rounded up in a search and sweep for terrorists, who in fact turns out to not be a terrorist, could be exposed to yelling, deception, and generally unpleasant treatment. The United States maintains that the military has sorted out “more than 10,000 suspects in Afghanistan and reduced their number to a select few who would make their way to Guantanamo.”⁷⁹ If the Category I and II methods are not restricted to those who have been clearly and properly identified as unlawful combatants, then the unpleasant treatment could have a negative galvanizing effect as suspected detainees are released back to their communities. Consequently US forces should rigorously adhere to the standards enunciated for noncombatants. They should routinely conduct Article 5 tribunals so they are certain of their determinations of combatants of any kind.

Conclusion

In the aftermath of 9/11, some have called for a “ruthless, ‘gloves-off’ response that would sweep aside legal and political obstacles.”⁸⁰ Yet the American public’s response to the Abu Ghraib abuses provides strong evidence that such an approach is still inconsistent with America’s values.

In the post-9/11 environment, US forces can expect to encounter six different types and categories of potential detainees, and they should be given clear guidance on how those detainees should be treated. They should fully comprehend the six categories and be fully cognizant of the boundaries of treatment for each category as it is currently codified and promulgated. And they must continue to abide by current restrictions until the debate leads to changes of internationally accepted and agreed-upon standards.

There is good reason for the international community to agree upon more understandable and more stringent measures against unlawful combatants and terrorists in order to deter hostile forces from adopting such tactics. But we must not legitimize inhumane measures and debase ourselves by adopting anything like the tactics of the common enemies of mankind.

NOTES

1. Cofer Black, Central Intelligence Agency (CIA), testimony before the Joint House and Senate Select Intelligence Committee, 26 September 2002, <http://www.freerepublic.com/focus/f-news/1112400/posts>.

2. Supreme Court of Israel, “Judgment Concerning the Legality of the General Security Service’s Interrogation Methods,” in *Torture*, ed. Sanford Levinson (Oxford, Eng.: Oxford Univ. Press, 2004), p. 181.

3. Fionnuala Ni Aolain, “The European Convention on Human Rights and Its Prohibition on Torture,” in Levinson, pp. 213-28.

4. Assistant Attorney General Jay Bybee, “Application of Treaties and Laws to Al Qaeda and Taliban Detainees,” memorandum for Alberto R. Gonzales Counsel to the President, and William J. Haynes II General Counsel of the Department of Defense, 22 January 2002. Mr. Bybee was citing a letter published during the Panama conflict from Abraham D. Sofaer, Legal Advisor State Department to Richard Thornburgh, Attorney General, 31 January 1990.

5. For purposes of this article, the “Global War on Terrorism” (GWOT) is used to include all military operations conducted in the aftermath of the 9/11 attacks, including Operation Enduring Freedom and Operation Iraqi Freedom, and the discussion of detainees held during the GWOT includes those being held in Iraq, Afghanistan, and Guantanamo Bay, Cuba, unless specifically detailed otherwise.

6. Alberto R. Gonzales, “Draft Memorandum,” 25 January 2002, in John Barry, Michael Hirsh, and Michael Isikoff, “The Roots of Torture,” *Newsweek*, <http://msnbc.msn.com/id/4999148/site/newsweek>.

7. Donald Rumsfeld, quoted in Reuters, “Pentagon: Geneva Convention Doesn’t Cover Detainees,” 11 January 2002, <http://www.crimelinx.com/nogen.html>.

8. Gonzales, “Draft Memorandum.” Gonzales reportedly stated “this new paradigm renders obsolete Geneva’s strict limitations . . . and renders quaint some of its provisions” and, while not fully repudiating the memorandum, did qualify the memorandum at his confirmation hearing as reported by David Stout, “Gonzales Disavows Torture as Confirmation Hearings Begin,” *The New York Times*, 6 January 2005, <http://www.nytimes.com/2005/01/06/politics/07gonzalezcd.html?ex=1107493200&en=8d64c7bccc8cb1e6&ei=5070>.

9. Seymour Hersh, “The Grey Zone,” *The New Yorker*, 24 May 2004, p. 38.

10. See e.g., Human Rights Watch, “A Broad Pattern of Abuse and Denial,” 4 May 2004, http://www.history.pomona.edu/vis/05h21/readings/hrw_iraq_torture.html; “Interrogation Techniques for Guantanamo Detainees,” <http://hrw.org/english/docs/2004/08/19/usdom9248.htm>; and “The Road to Abu Ghraib,” June 2004, <http://www.hrw.org/reports/2004/usa0604/>. Also see Dana Priest and Barton Gellman, “U.S. Decries Abuse but Defends Interrogations; ‘Stress and Duress’ Tactics Used on Terrorism Suspects Held in Secret,” *The Washington Post*, 26 December 2002, sec. A, p. 1.

11. US Congress, Senate, Armed Services Committee, Special Subcommittee on Abu Ghraib, 108th Congress, 2d sess., 19 May 2004.

12. Robert Hrjov, “Detainee Operations Update,” *Legal Center Newsletter Quarterly*, December 2004. The article reports that both AR 190-8 and FM 34-52 are currently being revised and are scheduled for publication in 2005.

13. Chalers C. Krulak, “The Strategic Corporal: Leadership in the Three Block War,” *Marines Magazine*, January 1999; available from http://www.au.af.mil/au/awc/awcgate/usmc/strategic_corporal.htm.

14. Geneva Conventions, *Geneva Convention (III) Relative to the Treatment of Prisoners of War*, 12 August 1949, available from <http://www.icrc.org/IHL.nsf/ART?Openview>. Hereinafter Geneva III.

15. Alberto Gonzales, White House Legal Counsel, and William Haynes, General Counsel, Department of Defense, White House Press Briefing, 22 January 2004, <http://www.whitehouse.gov/news/releases/2004/06/20040622-14.html>. Hereinafter “Gonzales, press briefing.”

16. Donald Rumsfeld, “Status of Taliban and Al Qaida,” memorandum for the Chairman, Joint Chief of Staff, Washington, D.C., 19 January 2002.

17. George W. Bush, White House Press Briefing, Rose Garden, Washington, D.C., 28 January 2002, <http://www.whitehouse.gov/news/releases/2002/01/20020128-13.html>.

18. George W. Bush, “Humane Treatment of Al Qaeda and Taliban Detainees,” White House Memorandum, Washington, D.C., 7 February 2002, http://lawofwar.org/Bush_memo_Genevas.htm.

19. *Ibid.* Indeed, the memorandum makes specific mention of the written legal opinions of the Department of Justice, the Attorney General, and the facts provided by the Department of Defense.

20. United Nations, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 26 June 1987, <http://www.hrweb.org/legal/cat.html>.

21. Vanessa Blum, “The New Rules of War; Iraqi Tactics Force JAGs to Rethink Combat Protocol,” *Legal Times*, 7 April 2003, p. 1.

22. Gonzales, press briefing.

23. *Ibid.*

24. George W. Bush, “White House Fact Sheet: Status of Detainees at Guantanamo,” 7 February 2002; available from <http://www.whitehouse.gov/news/releases/2002/02/print/20020207-13.html>.

25. *Ibid.*

26. Gonzales, “Draft Memorandum.”

27. *Ibid.*

28. *Ibid.* Particular note should be given to the phrase: “Preserves flexibility: . . . the need to try terrorists for war crimes such as wantonly killing civilians.”

29. In discussing the issue of treating terrorists under either a criminal or Geneva paradigm, Mr. Haynes, Department of Defense Deputy General Counsel, speaking at Judge Gonzales’s Press Briefing, 22 January 2004, stated: “Now some people think that we’re wrong, we’re wrongheaded in that. They say you should either charge them with a crime; or you should treat them as prisoners of war, as that term is detailed and I described earlier under the conventions; or you should let them go. Now, we think that there are other options. We’re in a unique conflict. We’re in a global war on terror against people who are not just committing crimes; they’re killing Americans on a scale that amounts to warfare.”

30. The United States skirted the issue in these instances by deciding “to extend basic prisoner of war protections to such persons . . . based upon strong policy considerations, and . . . not necessarily based on any conclusion that the United States was obligated to do so as a matter of law.” Bybee memorandum.

31. Geneva III, Article 4.

32. US Department of the Army, *Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees*, Army Regulation 190-8 (Washington: Department of the Army, 1 October 1997), p. 1-1. Paragraph 1-4 notes the Secretary of the Army as the Executive Agent for the DOD program for enemy prisoners of war, civilian internees, and retained personnel.

33. *Ibid.*

34. US Department of the Army, *Intelligence Interrogation*, Field Manual 34-52 (Washington: Department of the Army, 28 September 1992), p. ii. Hereinafter FM 34-52.

35. *Ibid.*, p. iv.

36. *Ibid.*, pp. 1-17 and 2-21.

37. *Ibid.*, p. 2-13.

38. *Ibid.*, p. 1-9.

39. *Ibid.*, p. 1-10.

40. *Ibid.*, p. 1-7.

41. Human Rights Watch, “The Road to Abu Ghraib,” Introduction.

42. Gonzales, press briefing. Gonzales stated: “Now a few of the misinformed have asked whether the President’s February 7th determination contributed to the abuses at Abu Ghraib. We categorically reject any connection.”

43. “Confusion about what interrogation techniques were authorized resulted from the proliferation of guidance and information from other theaters of operation; individual interrogator experiences in other theaters; and, the failure to distinguish between interrogation operations in other theaters and Iraq. This confusion contributed to the occurrence of some of the non-violent and non-sexual abuses.” Lieutenant General Anthony R. Jones and Major General George R. Fay, “Investigation of Intelligence Activities at Abu Ghraib,” memorandum for Acting Secretary of the Army Les Brownlee, Baghdad, Iraq, 23 August 2004, Executive Summary.

44. Geneva III.

45. *Ibid.*, Article 3.

46. *Ibid.*, Article 10.

47. *Ibid.*, Article 4A.(2)

48. Geneva Conventions, Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, <http://www.icrc.org/ihl.nsf/7c4d08d9b287a42141256739003e636b/f6c8b9fee14a77fdc125641e0052b079>.

49. *Ibid.*

50. *Ibid.* Whereas Article 4 of Geneva III requires four explicit criteria for obtaining lawful combatant status, Article 44 of Protocol I provides instead:

Article 44. Combatants and prisoners of war.

1. Any combatant, as defined in Article 43, who falls into the power of an adverse Party shall be a prisoner of war.

2. While all combatants are obliged to comply with the rules of international law applicable in armed conflict, violations of these rules shall not deprive a combatant of his right to be a combatant or, if he falls into the power of an adverse Party, of his right to be a prisoner of war, except as provided in paragraphs 3 and 4.

3. In order to promote the protection of the civilian population from the effects of hostilities, combatants are obliged to distinguish themselves from the civilian population while they are engaged in an attack or in a military operation preparatory to an attack. Recognizing, however, that there are situations in armed conflicts where, owing to the nature of the hostilities an armed combatant cannot so distinguish himself, he shall retain his status as a combatant, provided that, in such situations, he carries his arms openly:

(a) during each military engagement, and

(b) during such time as he is visible to the adversary while he is engaged in a military deployment preceding the launching of an attack in which he is to participate.

(c) Acts which comply with the requirements of this paragraph shall not be considered as perfidious within the meaning of Article 37, paragraph 1.

51. Geneva III has been ratified by 192 nations, whereas Protocol I has been ratified by 162 nations, including the United States’ initial partners during Operation Iraqi Freedom—the United Kingdom and Spain.

52. Richard R. Baxter, “So-Called ‘Unprivileged Belligerency’: Spies, Guerrillas, and Saboteurs,” *British Year Book of International Law* 1951, Vol. 28 (London: Oxford Univ. Press, 1952), pp. 323-45. Also 28 *British Year Book of International Law* 321, 328 (1952).

53. Robert K. Goldman and Brian D. Tittmore, "Unprivileged Combatants and the Hostilities in Afghanistan: Their Status and Rights Under International Humanitarian and Human Rights Law," *The American Society of International Law*, December 2002, <http://www.asil.org/taskforce/goldman.pdf>.
54. Paul E. Kantwill and Sean Watts, draft article, "Hostile Protected Persons or 'Extra-Conventional Persons': How Unlawful Combatants in the War of Terrorism Posed Extraordinary Challenges for Military Attorneys and Commanders," February 2005.
55. Baxter.
56. Bush, White House Fact Sheet.
57. Lieber Code, "Instructions for the Government of the Armies of the United States in the Field," articles 82-85, 24 April 1863, <http://www.au.af.mil/au/awc/awcgate/law/liebercode.htm>.
58. Jean Pictet, *Humanitarian Law and the Protection of War Victims* (Geneva, Switzerland: Henry Dunant Institute Press, 1975), p. 102.
59. Baxter.
60. Heather MacDonald, "How to Interrogate Terrorists," *City Journal*, 15 (Winter 2005), http://www.city-journal.org/html/15_1_terrorists.html. MacDonald states: "But there is a huge gray area between the gold standard of POW treatment reserved for honorable opponents and torture, which consists of the intentional infliction of severe physical and mental pain. None of the stress techniques that the military has used in the war on terror comes remotely close to torture, despite the hysterical charges of administration critics."
61. Dana Priest and Barton Gellman, "U.S. Decries Abuse but Defends Interrogations," *The Washington Post*, 26 December 2002, sec. A1.
62. Donald Rumsfeld and William J. Haynes II (General Counsel), "Action Memorandum: Counter Resistance Techniques," memorandum for the Chairman, Joint Chief of Staff, Washington, D.C., 2 December 2002.
63. Ibid.
64. Human Rights Watch, "The Road to Abu Ghraib," p. 8. Human Rights Watch cites a *Washington Post* article of 26 December 2002 and a December 2002 Human Rights Watch report.
65. White House Fact Sheet, 7 February 2002.
66. Gonzales, press briefing.
67. An experienced interrogator at the detention facility in Bagram, Afghanistan, stated that his most successful interrogation occurred when he was able to discuss the United States' compliance with human rights as a prelude to convincing him that the US forces were not the forces of evil portrayed by the Taliban or al Qaeda. Likewise, other interrogators report that success comes often by convincing detainees of the folly of the tactics and procedures employed by terrorists in opposition to the ideals of Islam.
68. G. I. A. D. Draper, "The Legal Classification of Belligerent Individuals," in *Reflections on Law and Armed Conflicts—Selected Works on the Laws of War*, eds. Michael A. Meyer and Hilaire McCoubrey (London: Brill, 1998), pp. 196-200.
69. Michael Howard, "It's Not So Much War; It's More Like a Hunt," *The Times* (London), 2 October 2001.
70. Aoilain. Also noted in Lieutenant Colonel Diane Beaver, Staff Judge Advocate, Joint Task Force-170, "Legal Brief on Proposed Counter-Resistance Strategies," memorandum for the Commander Joint Task Force-170, Guantanamo Bay, Cuba, 11 October 2002, http://www.npr.org/documents/2004/dod_prisoners/20040622doc3.pdf.
71. Supreme Court of Israel, p. 181.
72. Dana Priest, "US Seeks Long-Term Solution for Detainees," *The Patriot News* (Harrisburg, Pa.), 3 January 2005, sec. A, p. 3. Priest cites several sources but also makes the argument that George Tenet, then Director of the CIA, admitted to such conduct in his congressional testimony. Independent analysis of Tenet's testimony calls into question such a conclusion.
73. Geneva Conventions, *Convention (IV) Relative to the Protection of Civilian Persons in Time of War*, 12 August 1949, available at <http://www.icrc.org/IHL.nsf/ART?Openview>. Hereinafter Geneva IV. See, for example, Geneva IV, Article 42.
74. FM 34-52, p. 2-17.
75. Geneva III, Article 3.
76. Association of the Bar of the City of New York, Committee on International Human Rights, Committee on Military Affairs and Justice, "Human Rights Standards Applicable to the United States' Interrogation of Detainees," <http://www.abcnyc.org/pdf/HUMANRIGHTS.pdf>. The report is sometimes referred to as the Horton Report after one of its principal authors.
77. Geneva IV, Article 80.
78. Ibid., Articles 81 and 83.
79. Gonzales, press briefing.
80. Anthony E. Hartle, *Moral Issues in Military Decision Making* (2d ed., rev.; Lawrence: Univ. Press of Kansas, 2004), p. 204.